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Issue Date: 11 May 2007

Case No. 2005-LHC-2563

In the Matter of

D.C.,
Claimant,

v.

BUNGE NORTH AMERICA, INC.,
Employer,

and

PACIFIC EMPLOYER'S INSURANCE,
Carrier.

Appearances:

Alton D. Priddy, Esq.
For Claimant

B. Matthew Struble, Esq.
For Employer

Before: Edward Terhune Miller
Administrative Law Judge

DECISION AND ORDER AWARDING PERMANENT PARTIAL DISABILITY BENEFITS

This proceeding involves a claim under the Longshore and Harbor Workers' Compensation Act ("Act" or "LHWCA"), 33 U.S.C. § 901 *et seq*. Claimant is seeking disability and medical benefits for a work-related head injury on May 14, 2001, which he claims left him permanently and totally disabled (ALJX 1).[1]

[1] The following abbreviations are used as citations to the record: "CX" for Claimant's Exhibits, "EX" for Employer's Exhibits, "ALJX" for Administrative Law Judge Exhibits, "JX" for Joint Exhibits, and "Tr." for the hearing transcript.

A formal hearing was held on April 19, 2006, in St. Louis, Missouri, at which both parties were afforded a full opportunity to present evidence and argument as provided by law and applicable regulations. Claimant's exhibits 1 through 9 and Employer's exhibits 1 through 40 were admitted into evidence. The parties' stipulations, ALJX 1, and two depositions, JX 1 and 2, were admitted into evidence without objection. Both parties filed post-hearing briefs. The findings and conclusions which follow are based on the evidence of record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent.

STIPULATIONS

The parties have stipulated:

1. The Act applies to this claim.
2. The injury occurred on May 14, 2001 in Shawneetown, Illinois, on the Ohio River.
3. The injury arose out of and in the course of the worker's employment with Employer.
4. Employer was timely notified of the injury.
5. This claim was timely filed.
6. The Notice of Controversion was timely filed.
7. Claimant was totally temporarily disabled from May 15, 2001 through June 8, 2003.
8. Claimant received weekly benefits in the amount of $233.46 from May 14, 2001 through June 9, 2003.
9. Claimant reached maximum medical improvement approximately two years post-accident.[2]
10. Claimant has not returned to his usual job. (ALJ 1)

ISSUES

1. Is Claimant permanently and totally disabled?
2. If not, is Claimant permanently partially disabled?

[2] The parties expressly stipulated that maximum medical improvement occurred "approximately two years post-accident." (ALJX 1). However, the parties also expressly stipulated that Claimant's temporary total disability ended on June 9, 2003 and Employer stopped paying temporary total disability benefits on that date. Thus, it is reasonable to infer from the stipulation and the medical evidence that the exact date of Claimant's maximum medical improvement is June 9, 2003, and this tribunal so finds.

STATEMENT OF THE CASE

Claimant was born in 1980. (Tr. 24). He graduated from high school in 1998, and has no additional education. (Tr. 25). During high school, Claimant worked part-time at a bait shop and earned $3 per hour. (Tr. 93). After graduating from high school, Claimant worked for his cousin, who was a plumber. (Tr. 26). His hourly wage was $7.50 per hour, and he worked on a full-time schedule. (Tr. 27, 94). In 1999 and 2000, he worked as a carpenter, and he made between $7 and $10 per hour. (Tr. 26-27, 97). However, his social security records indicate that he did not work full-time, as he earned only $1,194.70 in 1999 and $2,252.25 in 2000 for a company called Southeastern Residential Alternatives. (EX 36, p. 2). He then worked as a forklift operator for nine months and earned $8.50 per hour plus overtime.[3] (Tr. 26, 28; EX 38, p. 3). As a forklift operator, he earned $10,653.04 in 2000 and $4,380.44 in 2001. (EX 36, p. 2). He quit his job as a forklift operator to seek employment with Employer. (Tr. 26).

Employer hired Claimant as a temporary grain elevator laborer sometime around April 30, 2001.[4] (EX 37, p. 1; Tr. 101-102, 232). As a grain elevator laborer, Claimant's duties included cleaning out the basements and belt lines under the elevators, helping to repair grain legs, and cleaning out grain bins. (Tr. 29). He worked 40 hours per week and earned $6.50 per hour. (Tr. 28; EX 37, p. 1).

At the time of Claimant's injury, Employer was under contract with the local labor union. (Tr. 225; CX 8). The labor contract provided that for the first 120 days of employment, an employee was not to be paid less than $6.50 per hour. (Tr. 228; CX 8). From the 121st day through the 180th day of employment, an employee was not to be paid less than $7 per hour. (Tr. 228; CX 8). During days 181 through 360, the minimum wage payable under the contract was $8 per hour. (Tr. 228; CX 8). After 360 days of employment, the employee is paid according to the "classification" in which he or she works. (Tr. 228; CX 8). For elevator laborers, the rate is $10.30 per hour. (CX 8). At the time of the injury, Claimant worked alongside three other elevator laborers - Adam Brown, Jim Long, and Ralph Palmer. Like Claimant, Mr. Brown was hired on a temporary basis and was earning $6.50 per hour. (Tr. 234, 236; EX 39). Mr. Long was a full-time, permanent elevator laborer who had been employed by Employer for over one year and was earning $10.30 per hour. (Tr. 238-240). Mr. Palmer was a full-time employee who had completed 120 days on the date of the injury. (Tr. 236). At that time, Mr. Palmer's hourly rate was $8 per hour. (EX 39).

On May 14, 2001, approximately two weeks after he was hired, and while performing his duties as a barge laborer for Employer, Claimant suffered injuries when he was struck on the

[3] Claimant testified that he started at $8.25 per hour, and his hourly rate increased to $8.75 per hour. (Tr. 26, 28). However, on his application for employment with Employer, Claimant listed his starting salary as $8.00 per hour and his final salary as $8.50 per hour. (EX 38). The statement on his application is deemed more credible.

[4] Claimant testified that he believed that at the end of his temporary employment, he would be offered a full time job. (Tr. 102-110). However, Carl Wargel, Employer's central district manager, testified that Employer rarely hires temporary employees on a permanent basis. (Tr. 223-24; 231). Instead, most new hires are strictly temporary and are never offered full-time positions. (Tr. 231). Moreover, the New Hire Report signed by Claimant on April 30, 2001, indicates that he was hired on a temporary basis that was to end on June 1, 2001, only one month after his date of hire. (EX 37, p. 1).

head and shoulder by an out-of-control back rigging block. (EX 29, p. 1). He was knocked into the water but was immediately rescued by his co-worker and did not drown. (EX 35, p. 1). He was transported by helicopter to Deaconess Hospital in a comatose state. (EX 35, p. 1). While at Deaconess, he was seen by Dr. Emil Weber and diagnosed with brain stem torsion injury with small mesencephalic hemorrhages with predominately right hemiparesis as deficit, a left basilar skull fracture, an open fracture of the clavicle on the left slide, a left scapular fracture, a pulmonary contusion in the left upper lobe, and a right pleural effusion. (CX 6, p. 1; EX 35, p. 2).

While being treated at Deaconess, Claimant remained in a comatose state, but by late June, he was able to nod "yes" and "no" and move his toes upon request. (EX 35, p. 1). He was then transferred to Healthsouth TriState Rehabilitation Hospital. (EX 35, p. 1). He was comatose for two months and hospitalized for a total of four months. (Tr. 30). He was released from the hospital to a rehabilitative program where he spent five months. (Tr. 31). As part of his rehabilitative program, Claimant began playing pool. (Tr. 53). Immediately following the accident, Claimant's father was court-appointed as his guardian. (Tr. 60; EX 24, p. 1). However, as Claimant's physical and mental condition improved, Claimant no longer felt that he was incapable of managing his own financial affairs and petitioned the court to terminate the guardianship in March of 2002. (EX 24, p. 1).

Dr. Weber continued as Claimant's treating neurologic surgeon after Claimant completed rehabilitation. (EX 1-5). In a report dated September 26, 2001, Dr. Weber opined that Claimant "is a young man and with time and healing one would expect continuing improvement, although I am sure it will not be total." (EX 2, p. 2). Once month later, Dr. Weber noted that while Claimant's mental function was improving, his fine motor skills were not. (EX 3, p. 2). Dr. Weber therefore recommended that Claimant continue playing pool. (EX 3, p. 2).

In a subsequent report dated January 2002, Dr Weber noted that Claimant was "playing table tennis and apparently is fairly competitive with that and handles himself pretty well with that . . . ." (EX 4, p. 2). He opined that Claimant was able to return to work and noted that at the time, Claimant planned to work as a maintenance person. (EX 4, p. 2). Dr. Weber opined that Claimant was both mentally and physically capable of performing that job. (EX 4, p. 2). Thus, Dr. Weber released Claimant to that type of work without any restrictions. (EX 4, p. 2; EX 5). Around that time, Dr. James E. Goris, who treated Claimant for his left shoulder injury, also released Claimant to work with no restrictions. (EX 7, 8).

Dr. Weber testified that during the course of treatment, he advised Claimant to engage in physical activities such as riding a bicycle or playing basketball as part of a physical therapy regimen. (JX 1, pp. 25-26). As the doctor put it "[Y]ou don't want [brain injury patients] to sit around and not do much. You want them to be actively involved in doing things to develop their capabilities again." (JX 1, p. 26). Moreover, Dr. Weber pointed out that inactivity has an impact on a person's stamina, and one becomes "out of shape" with respect to daily life. (JX 1, p. 36). Thus, he felt that it would be a mistake for Claimant not to have returned to work, and he felt that there was no reason that Claimant could not have returned to work. (JX 1, p. 39). However, he stated that he would defer to the vocational experts' opinions as to Claimant's employability. (JX, p. 56). Finally, he testified that he released Claimant from his care on January 30, 2002,

because he felt that Claimant was no longer in need of neurosurgical care, not because he did not want Claimant to have to travel to Evansville to see him. (JX 1, p. 38).

On March 25, 2002, Dr. Jeffery Gray performed a neuropsychological examination on Claimant. (CX 6). Based on his examination, Dr. Gray found that Claimant's greatest neurocognitive residual was inefficient information processing. (CX 6, p. 3). He further found that Claimant suffered from intermediate deficits which were most likely due to the inefficient processing. (CX 6, p. 3). Dr. Gray concluded that Claimant experienced problems with selective and divided attention and attending with competing stimuli. (CX 6, pp. 3-4). Dr. Gray recommended medication for these problems, but Claimant refused. (CX 6, p. 4).

Dr. Gray opined that Claimant's emotional status was basically unremarkable. (CX 6, p. 4). He noted that while "he certainly has the normal frustrations that one would appear to present with any such trauma in his life, he does not appear to present with any clinically significant depression, anxiety or the like." (CX 6, p. 4). Dr. Gray concluded that Claimant would experience "a great deal of difficulty with complex, and perhaps highly detailed types of tasks." (CX 6, p. 4). On the other hand, the doctor found that Claimant did have the neurocognitive ability to do simple repetitive tasks as long as the tasks were only one to three steps in nature and did not require stringent speed, quota component, or frequent shifts. (CX 6, p. 4). In addition, Dr. Gray felt that Claimant would benefit from a job coach, but that he could be trained to do some tasks and that he was "quite motivated and [had] improved significantly." (CX 6, p. 4).

Claimant's vocational abilities were tested several times after the injury. He was first evaluated at the Rehabilitation Institute of Southern Illinois University at Carbondale (the Institute) from August 5, 2002 through August 7, 2002. (CX 7, p. 1). During the evaluation, Claimant was friendly, punctual, social, and able to maintain a schedule. (CX 7, p. 3). No significant inappropriate work behaviors were observed. (CX 7, p. 4)

Various tests were performed to gauge Claimant's intelligence and cognitive abilities. (CX 7, p. 4). Claimant was found to have average intelligence, average short-term memory, and below average processing speed. (CX 7, p. 5). In addition, Claimant's scholastic aptitudes and academic achievements were tested. (CX 7, p. 6). The results indicated that Claimant needed improvement in reading and written language skills but was skilled in mathematics. (CX 7, p. 6). Claimant's specific job aptitude was also tested, and the results indicated that Claimant had a high probability of job training success in several vocational areas and a moderate probability of job training success in others. (CX 7, pp. 7-8). Some occupations for which Claimant was found suitable included wildlife control agent, test driver, shipping and receiving clerk, janitor, sales person, construction worker, material handler, and automobile service station manager. (CX 7, pp. 8-11). The results of Claimant's personality and worker traits tests indicated that there was some concern relating to Claimant's anger control, hostile control, persecutory thinking and other psychotic phenomena, and tendency to act out. (CX 7, p. 12). The Institute therefore recommended individual support counseling, stress management, and anger management. (CX 7, pp. 12, 19). Finally, the results of job readiness tests indicated that he would benefit from a job readiness class to enhance his knowledge of the world of work, self-appraisal, and occupational information. (CX 7, p. 13).

The Institute concluded that Claimant was unable to return to work as an elevator laborer because of his difficulty with balance and deficit lower body coordination skills. (CX 7, p. 14). As to other occupations, the Institute found that Claimant might be restricted or limited in jobs requiring balancing, running, bimanual overhead reaching, and climbing. (CX 7, p. 18). A functional capacity evaluation or an on-the-job evaluation to assess and monitor job performance and physical demand would also be needed. (CX 7, p. 18). The Institute predicted that Claimant would need "moderate assistance" in obtaining and maintaining a job. (CX 7, p. 18). The Institute also suggested that Claimant was a good candidate for vocational training or college programming. (CX 7, p. 17).

Around the time that the Institute's evaluation was completed, Claimant met with Brenda Lantham, a certified rehabilitation counselor, to discuss available vocational services. (EX 17, p. 1). Based on her review of Dr. Gray's neuropsychological examination and her interview with Claimant, Ms. Lantham identified 11 job opportunities located in the area of Claimant's home. (EX 17; EX 18). She identified these opportunities by reviewing the classified ads in the *Harrisburg Daily Register* and making phone calls to potential employers to inquire as to the specifics of the job opportunities. (EX 18, p. 1); EX 40, p. 31). She then determined which opportunities were within Claimant's capabilities based on the findings in Dr. Gray's neuropsychological evaluation. (EX 40, p. 18). She listed the specific job duties for only one of the identified opportunities – that as a lot man for Jim Hayes Ford dealership in Harrisburg, Illinois. (EX 18, p. 1). The specific duties for that opportunity consisted of cleaning vehicles and maintaining the yard, as well as performing odd jobs. (EX 18, p. 1). This position paid minimum wage[5]. (EX 18, p. 1).

Claimant's vocational abilities were evaluated again on January 8, 2003 at Coleman Tri-County Services. (EX 21, p.1). In his vocational interview, Claimant explained that his day consists of feeding and watering his hunting dogs, spending time with his grandmother at her ceramic shop, and visiting some friends at a local car paint and detail shop and Rashes Quick Mart. (EX 21, p. 2). Claimant also stated that he was active in his local hunting club and rode his four-wheeler, which he rode in the local parade. (EX 21, p. 2). Claimant reported that he exercises by hunting with his dogs which requires walking in rough terrain, but not on a daily basis. (EX 21, p. 3). He had previously been walking a route in town for exercise but had stopped doing so in October. (EX 21, p. 3). In addition, Claimant told the evaluator that he enjoyed socializing with his friends at the local hang outs and playing pool and participating in pool tournaments in the local taverns. (EX 21, p. 2). Claimant stated that he did not feel ready to ride his motorcycle again. (EX 21, p. 2). The evaluator noted that Claimant's appearance and disposition were appropriate. (EX 21, p. 2). He did not exhibit any major anger or frustration. (EX 21, p. 4).

During the evaluation, Claimant was observed working on assigned cleaning tasks involving cleaning a bathroom, vacuuming a conference room, dusting a desk and other furniture, and sweeping and mopping a cafeteria floor. (EX 21, p. 3). Claimant was observed

[5] Ms. Lantham's report is dated March 17, 2003, and indicates that the salary offered for the Jim Hayes Ford position was $5.15 per hour to start. (EX 18). However, as of the date of the hearing, the minimum wage for the state of Illinois has increased to $6.50 per hour. *See* 820 ILL. COMP. STAT. §105/4 (2007).

showing signs of fatigue; he began limping more, and complained of pain in his left shoulder after vacuuming. (EX 21, p. 3). Based on those observations, the evaluator concluded that Claimant could only work at a continuous level of three to four hours. (EX 21, p. 3). Thus, he was not considered "job ready" as a janitor at that time. (EX 21, p. 4).

Based on the evaluation, the evaluator concluded that Claimant was able to return to work, possibly as a truck driver. (EX 21, p. 3). The evaluator found that Claimant was not able to work at any job that had any physical demands for more than four hours per day until he was able to build endurance. (EX 21, p. 3). It was further noted that Claimant's endurance was low at the time of the evaluation because Claimant was not engaging in any strenuous daily activity at home and was no longer involved in physical therapy. (EX 21, p. 3). In comparing his performance during the Coleman Tri-County Services evaluation and the Institute's evaluation, the evaluator commented that Claimant's "stamina and endurance levels were probably better a year ago than they are now because of his inactivity at home." (EX 21, p. 6).

Claimant and his grandmother met with J. Stephen Dolan, a certified rehabilitation counselor with over 30 years of experience, on January 3, 2005, to discuss Claimant's vocational abilities. (CX 1). Mr. Dolan interviewed and tested Claimant for three and half hours using peer-reviewed vocational assessment structured interview and testing format. (CX 4, p. 2).

Mr. Dolan noted that Claimant was receiving social security disability benefits. (CX 4, p. 2). The Social Security Administration had appointed his grandmother, Mrs. M., as the representative payee. (CX 4, p. 2). In addition, he noted that Claimant had graduated from high school with a C+/B- average. (CX 4, p. 2).

Mr. Dolan observed that Claimant

> bickered with his grandmother throughout the assessment. At one point he told her to "shut up!" [Claimant]'s general behavior seemed more like the behavior of a young teenager than of a 24 year old man, in that he was emotionally labile and several times made a point of explaining that he always does whatever he feels like doing and does not care what other people think about anything. He was rude and petulant with his grandmother, but polite to me.

(CX 4, p. 2).

During the interview, Claimant described his limitations as follows: frequent fatigue accompanied by sweat, dizziness, tingly or numb sensation in his extremities, and physical dysfunction; hot flashes; difficulty sitting; difficulty standing for extended periods of time; difficulty walking; difficulty stooping or crouching; difficulty climbing stairs; difficulty lifting with his left arm; difficulty carrying a glass of water or a plate of food; difficulty maintaining balance while sitting; difficulty using his left arm to push or pull; difficulty using his left hand; shaky arms; slurred speech; impaired eyesight; lack of concentration; anger management problems; frequent confusion; and memory problems. (CX 4, pp. 4-6). Mr. Dolan noted in his

report that Claimant walked with a cane, that "[h]e tries to keep the cane in front of the middle of his body, not to the left or right," but admitted in his testimony that he had assumed, but failed to indicate in his report, that Claimant used the cane for long distances only since Claimant did not have a cane when he came to his office. (Tr. 152). Moreover, he indicated that he did not find Claimant to be a very credible historian as to his physical and mental disabilities because he thought Claimant was trying "real hard to impress [Mr. Dolan] with how unlimited he was and with all the activities he could do." (Tr. 148). However, when asked at the hearing about the portion of the report which indicated that Claimant was unable to crouch, Mr. Dolan responded that "[y]ou're talking about all the things that [Claimant] told me that we've already discussed that I didn't always find credible." (Tr. 153). After recording Claimant's complaints, Mr. Dolan asked Claimant a series of questions relating to his daily activities. (CX 4, p. 6). The purpose of the questioning was to ascertain if what he said about his daily activities supported or belied what he had said about his functional limitations. (CX 4, pp. 6-7).

In addition, Mr. Dolan reviewed medical records from Deaconess Hospital, Dr. Ashok K. Dhingra, and Dr. Jeffery W. Gray; the vocational evaluation report from Evaluation and Developmental Center in Carbondale; Ms. Latham's labor market survey; and Claimant's high school transcript. (CX 4, p. 1). Mr. Dolan summarized the vocational ramifications of Claimant's neurological deficits as described by Dr. Gray. (CX 4, p. 10). Mr. Dolan opined that because of Claimant's verbal abstract reasoning deficits, he needed a job where the work was concrete and tangible, and he required clear, simple, concrete instructions. (CX 4, p. 10). Further, because of Claimant's difficulty in processing incoming memory information, short-term memory problems, and difficulty attending with competing stimuli, Mr. Dolan believed that Claimant would need longer than usual to learn a job, more help learning the job, and more help learning any new job tasks. Because the public presented "lot's [sic] of variables," according to Mr. Dolan, Claimant could not have a job where he dealt with the public.

Based on Claimant's complaints, his answers to Mr. Dolan's questions, and Mr. Dolan's review of the medical and rehabilitative records, Mr. Dolan concluded that Claimant was not competitively employable. (CX 4, p. 11). Instead, Mr. Dolan felt that Claimant was employable in a supported employment program, a form of subsidized employment where a job coach is employed to teach a severely disabled person how to do a job and to coach the person as he or she performs the job. (CX 4, p. 11). Mr. Dolan concluded that this type of employment environment was suitable for Claimant because Claimant could not be employed without the support of a job coach. (CX 4, p. 11). He defined a "job coach" as somebody who teaches Claimant to do a particular job. (Tr. 139). He opined that it was likely that Claimant would need the services of a job coach for an extended period of time because Claimant was not likely to remember the things that the job coach taught him. (Tr. 139-40). Furthermore, Mr. Dolan concluded that because of Claimant's severe fatigue, he would be unable to maintain a full-time job. (CX 4, p. 11). Thus, at least until Claimant built up stamina, if Claimant ever did indeed build stamina, he would only be able to participate in a part-time, government subsidized, supported employment program. (CX 4, p. 11).

On June 23, 2005, Michael V. Oliveri, Ph.D., also performed a neuropsychological examination on Claimant. (CX 5). Dr. Oliveri also reviewed various medical reports and vocational assessments, including Deaconess Hospital records, Health South Tri-State

Rehabilitation Hospital records, Dr. Weber's records, Center for Advanced Hearing Care records, orthopedic records, driver's evaluation from the Rehabilitation Center, Dr. Gray's evaluation, Southern Illinois University at Carbondale's vocational evaluation, the Coleman Tri-County Services facility evaluation, and a vocational rehabilitation assessment prepared by Mr. Dolan. Based on his review of the pertinent records, his interviews with Claimant and his family, and the results of the tests, Dr. Oliveri found that Claimant suffered from a range of mild to moderate residual neuropsychological dysfunction, including both neurocognitive and psychosocial domains. (CX 5, p. 7). Claimant's neurocognitive deficits included reduced speed of processing, impairment in sustained and divided attention, diminished rote verbal learning and verbal short-term memory, and diminished motor speed and manual dexterity. (CX 5, p. 7). Claimant's psychosocial deficits included apathy which was uncharacteristic for Claimant, impulse control, and executive function deficits. (CX 5, p. 7). Thus, Dr. Oliveri concluded that diagnostically, Claimant would meet the criteria for a residual mild-moderate dementia syndrome secondary to traumatic brain injury. (CX 5, p. 7). There were no convincing indications of residual affective disorder, but there appeared to be some suggestions of unusual and bizarre ideation and some limitation in impulse control. (CX 5, p. 7).

In his report, Dr. Oliveri concluded that in light of Claimant's neuropsychological profile, he was not able to return to independent vocational functioning at his previous level. (CX 5, p. 7). However, at his deposition in March 2006, Dr. Oliveri essentially recanted this statement, explaining that at the time that he made the statement, he believed that Claimant had previously performed skilled labor, and that "some return to unskilled activities would be a reasonable goal." (JX 2, pp. 41-42). Dr. Oliveri declared that work-related activities would need to accommodate Claimant's physical and cognitive deficits, which would require an environment with significant structure and supervision. (CX 5, p. 7). Dr. Oliveri added that the level of structure and supervision needed is not typically available in the competitive work setting, but that Claimant could work outside a sheltered work program. (CX 5, p. 7; JX 2, p. 47).

At the request of Employer, the final evaluation of Claimant's vocational skills was completed by Timothy Kaver, a certified rehabilitation counselor with over 20 years of experience, on March 13, 2006. (EX 15). Mr. Kaver personally interviewed Claimant and reviewed his medical records and other documents. Claimant reported to Mr. Kaver that he had experienced "Anger issues," but was able to keep them under control. (EX 15, p. 3). He also reported sleeping in excess of eight hours per night, having occasional word recall problems, occasionally slurring his words, short-term memory difficulty, a decrease in his vocabulary, and difficulty arising from a squatting position. (EX 15, p. 3). He told Mr. Kaver that he places his hand on the floor in order to keep his balance when rising from a squatting position. (EX 15, p. 3). Claimant told Mr. Kaver that he compensated for his head injury symptoms by using his cell phone to keep a to-do list, which he demonstrated with proficiency to Mr. Kaver. (EX 15, p. 3). During the course of the interview, Mr. Kaver noted that Claimant "showed slight signs of having recovered from a head injury: an occasional slightly slurred word and an occasional word retrieval pause during conversation." (EX 15, p. 1).

Claimant informed Mr. Kaver that he had not looked for work since his accident. (EX 15, p. 5). He stated that he was not interested in returning to work as he received enough income from his social security disability benefits to meet his daily living needs. (EX 15, p. 6).

However, based on his review of the records and his interview with Claimant, Mr. Kaver concluded that Claimant was able to return to work and could succeed in entry-level, service related jobs which involve repetitive tasks. (EX 15, p. 7).

Mr. Kaver conducted a labor market survey in the commutable area from Claimant's home in Shawaneetown, IL. (EX 15, p. 8). Mr. Kaver "cold-called" potential employers and inquired as to whether Employers would be willing to hire an individual who had recovered from a head injury, but had not fully recovered. (EX 15, p.8). Mr. Kaver explained that the residual problems included short-term memory difficulties, balance when arising from squatting, and impaired learning speed. (EX 15, p. 8). Mr. Kaver further explained that if hired, Claimant would need on-the-job training, direct supervision, and the ability to utilize a daily job task list and calendar. (EX 15, p. 8). Mr. Kaver received positive responses from 14 potential employers who were hiring at the time that the inquiry was made. (EX 15, pp. 8-13). However, he listed the specific job duties for only six of these opportunities, as follows:

1. Dietary Aide for Carrier Mills Nursing Home – assist in food distribution (filling plates), stocking kitchen area, and any "go for" duties in dietary department; repetitive job duties involve on the job training; salary is $6.50 per hour; position is full-time.
2. Auto porter for Alan Miller GM Superstore – move cars on lot, wash cars and inside interior detailing, clean lot, clean inside building; starting salary is $8.00 per hour; employer is very open to considering applicant with disability; position does have much supervision and direction; employee works off daily duty list.
3. Busboy/Dishwasher for Ponderosa Steakhouse – bussing tables and washing dishes; salary is $6.50 per hour; job can be modified if necessary.
4. Stocker/General store clerk for McKim's IGA – stock shelves, bag groceries, clean floors and shelves; salary is $7.00 per hour; some lifting is required up to 30 pounds.
5. Stock Clerk for Food Giant Supermarket – stock shelves, clean, push carts, take inventory; very willing to consider employee with special needs, if he can do the job; starting salary is $6.75 per hour; employer is open to modifications if needed for employee to perform job duties.
6. Laborer for Morganfield Home Center – stock home center, unload and load materials, cleanup of store and grounds; starting salary is $8.00 per hour; job can be considered heavy when unloading and loading trucks; can assist employee as necessary; a daily job list is used

At the hearing, Mr. Dolan testified that upon receiving Mr. Kaver's report, he too called each of the employers listed in the report, with the exception of one employer who did not answer the phone. (Tr. 160). He asked each of the employers whether there were any positions available to somebody who would need "extraordinary supervision" and "might need a job coach." (Tr. 160). According to Mr. Dolan, each of the employers answered in the negative. (Tr. 160-161). The employers indicated that once they train their employees, the employees are expected to work independently. (Tr. 168). However, although he knew that he would testify about these phone calls at the hearing, he did not bring his notes with him and was therefore unable to give reliable dates when the phone calls were made or provide other credible corroboration. (Tr. 187).

At the time of the hearing, Claimant was living independently in a trailer next to his grandmother's home. (Tr. 25). Claimant testified that he has not looked for work since the accident. (Tr. 106-07) Claimant testified that since the injury, he has experienced poor balance and was therefore forced to give up some of the hobbies he enjoyed before the accident, such as racing motorized dirt bikes, riding mountain bicycles and "trick" bicycles. (Tr. 32–36). However, on cross-examination, Claimant admitted that he is still able to ride a bicycle, although not comfortably, and that he sometimes rides 4-wheelers at a local campground. (Tr. 75). Moreover, in the Coleman Tri-County Services report, the evaluator noted that a staff member had observed Claimant on his 4-wheeler "racing around in an erratic and questionably safe manner . . . [and] standing on the pedals and riding it from a standing position." (EX 21, p. 6).

In addition, Claimant has continued to play pool, sometimes in tournaments, and has begun bowling since the accident. (Tr. 52-53, 70). He was videotaped bowling with his family on March 1, 2006. (EX 22). He does not appear to exhibit any difficulty balancing as he bowls, and is shown walking with a cup of soda that has a lid on it. (EX 22). According to Claimant's father, however, Claimant is not struggling with his balance in the video because the surveillance was taken on a day that Claimant was experiencing "good balance." (Tr. 297). On direct examination, Claimant's father testified that in the six or seven weeks that Claimant had been bowling prior to the date that the surveillance was taken, Claimant had "stumbled and had to put his hands down to keep from falling face first to the floor." (Tr. 297). However, on cross examination, Claimant's father stated that this has only happened twice. (Tr. 301). Also, he testified that Claimant had to be reminded three or four times throughout the game that it was his turn to bowl, although he was unable to point out such instances while watching the surveillance video. (Tr. 298).

Claimant testified that prior to the accident, he enjoyed coon, squirrel, deer, and dove hunting, but since the accident he has been unable to fully enjoy these activities because of his problems with balance and memory. (Tr. 40-41). However, on cross examination, he admitted that he has been deer hunting every year since the accident, and generally hunts alone from a 12-foot deer stand which he is able to climb. (Tr. 77-80). In addition, Claimant testified that he enjoyed playing videogames prior to the accident, and continued playing them after the accident, although he did not enjoy them as much. (Tr. 43-44).

Claimant drives by himself, but claims that he must do all he can to avoid any distractions while driving. (Tr. 37). He has not been involved in any automobile accidents since the injury, but claims to have hit seven or eight deer because he was paying too much attention to the road and oncoming traffic. (Tr. 38). On cross examination, he admitted that the deer ran in front of his vehicle, and accidents involving deer are fairly common where he lives. (Tr. 77). Claimant also claimed that he remains concerned that he will swerve off the road as he was once pulled over by the police for swerving. (Tr. 39). When he was pulled over, because of his poor balance, he was unable to walk heel-to-toe when the police office requested that he do so. (Tr. 39). However, according to Dr. Weber, Claimant was able to walk heel-to-toe when he was evaluated in Dr. Weber's office on October 29, 2001. (JX 1, p. 30).

Since the injury, he also sleeps more, from twelve to fourteen hours per day, but only because he does not want to get out of bed. (Tr. 57, 85-86). He does not nap during the day. (Tr. 57). He claimed that when he wakes up in the morning, it is as though his mind were a chalkboard and the events that happened the day before have been erased. (Tr. 50). Claimant stated that his poor short term memory necessitated the use of a cellular phone to make daily to-do lists, but then admitted that he had not been using the cellular phone to make such lists. (Tr. 51). Moreover, he was able to recall with remarkable clarity the number of days that he had owned cell phones in the past:

> I've had two that worked. Then I had one for 26 days, and I went through two of them. When my contract ran out, I got another phone, and the phone lasted for six days. I took it, got another one just like that one, and it lasted 20 days, and it quit.

Claimant testified that he had difficulty controlling his anger. (Tr. 58). Both his grandmother and grandfather also testified that Claimant had difficulty controlling anger. (Tr. 175, 193). However, he testified that no medicine has been prescribed to him to resolve the problem, nor has he ever been diagnosed with depression. (Tr. 58-61).

Claimant's grandmother and grandfather also testified that before the accident, Claimant was very skilled with his hands and had once made a gun cabinet for his grandfather. (Tr. 176, 199). In addition, they testified regarding his short term memory problems. (Tr. 177-178, 196-201). Claimant's grandmother testified that because of his poor balance, Claimant is unable to handle a plate of food without spilling it. (Tr. 203). However, according to Dr. Weber, as of October 29, 2001, he would have expected that Claimant would have been capable of carrying a drink across the room without spilling it. (JX 1, pp. 24, 26). Claimant's grandmother also claimed that Claimant sometimes has trouble swallowing and drools and slurs when speaking. (Tr. 195, 203). However, at the hearing, Claimant did not obviously slur his words and was not observed drooling.

Claimant received temporary total disability compensation in the amount of $233.46 per week starting on May 14, 2001 and ending on June 9, 2003. (ALJX 1).

DISCUSSION AND CONCLUSIONS OF LAW

The LHWCA provides coverage for four separate categories of disabilities: (1) permanent total disability, (2) temporary total disability, (3) permanent partial disability, and (4) temporary partial disability. *Bunge Corp. v. Carlisle*, 227 F.3d 934, 939 (7th Cir. 2000). Disability under the LHWCA is defined "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 309(10); *Carlisle*, 227 F.3d at 941.

Courts have looked to two separate indicators as proof of permanent and total disability. *Id.* Once an employee reaches maximum medical improvement, a medical determination, he is considered permanently disabled if there is residual disability from his injury. *Id.* The date on which a claimant's condition has become permanent is primarily a medical determination that

the employee has received the maximum benefit of medical treatment such that his condition will not improve. *See Trask v. Lockheed Shipbulding & Constr. Co*., 17 BRBS 56, 60 (1985); *Mason v. Bender Welding & Mach. Co.*, 16 BRBS 307, 309 (1984). When no suitable alternative employment can be found for a disabled employee, he is usually deemed totally disabled. *Id.* at 939-40 (*citing SGS Control Servs. v. Director, Office of Workers' Compensation Programs*, 86 F.3d 488, 443-44 (5th Cir. 1996); *Stevens v. Director, Office of Workers' Compensation Programs*, 909 F.2d 1256, 1250 (9th Cir. 1990)). However, if the employer successfully meets its burden of proving the existence of suitable alternative employment, the claimant suffers at most a partial disability. *Berkstresser v. Washington Metro. Area Transit Auth.*, 16 BRBS 231, 233 (1984). In the instant case, the parties have stipulated that Claimant reached maximum medical improvement two years after the date of the accident. (ALJ 1). Thus, as to the category of disability, the issue is whether the claimant is totally or partially disabled, permanency not being in issue.

1. Total Disability

In order to establish total disability, a claimant must first establish a *prima facie* case by demonstrating that he cannot perform his prior employment due to the effects of a work-related injury. *Carlisle,* 227 F.3d at 941 (*citing Universal Maritime Corp. v. Moore*, 126 F.3d 256, 264 (4th Cir. 1997)). Once a prima facie case has been established, the burden shifts to the employer to demonstrate the availability of suitable alternative employment which the claimant is capable of performing. *Id.* (*citing Brooks v. Director, Office of Workers' Compensation Programs*, 2 F.3d 64, 65 (4th Cir. 1993)). The Seventh Circuit's test for establishing the existence of suitable alternative employment requires Employer to present evidence that a range of jobs exists that is reasonably available and that the disabled employee could realistically secure and perform. *Id.* (*citing Trans-State Dredging v. Benefits Review Bd.*, 731 F.2d 199, 201 (4th Cir. 1984); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1042-43 (5th Cir. 1981); *Air America v. Director, Office of Workers' Compensation Programs*, 597 F.2d 773 (1st Cir. 1979)). Once the existence of suitable alternative employment has been established, the burden shifts back to the claimant to show that he has unsuccessfully attempted to obtain such employment. *Id.*; *Williams v. Halter Marine Serv.*, 19 B.R.B.S. 248 (1987). That Claimant has not looked for work since the accident is not disputed.

Claimant contends that he cannot return to his regular or usual employment, and Employer does not refute this argument. (CB 15). Employer argues instead that suitable alternative employment exists, and Claimant has not pursued such opportunities. (EB 53). There is sufficient evidence in the record to support Claimant's assertion that he is unable to return to work as an elevator laborer. While it is true that upon learning that Claimant's position as an elevator laborer did not require him to perform skilled labor, Dr. Oliveri recanted his opinion that Claimant was unable to return to the level of vocational functioning that he had attained prior to the injury, Dr. Oliveri did not take into consideration the dangers inherent in Claimant's job as an elevator laborer. As an elevator laborer, Claimant worked around heavy equipment, and the cause of his injury was the malfunction of such equipment. It is unanimous among the expert witnesses in this case that Claimant suffers a deficiency in his information processing skills and has a difficult time dealing with competing stimuli. Thus, the evidence of

record supports that he unable to return to an inherently dangerous job such as an elevator laborer for Employer.

Thus, the first issue to be resolved is whether Employer has established that suitable alternative employment exists. *See Carlisle*, 227 F.3d at 941. The record supports the conclusion that it has. To establish that suitable alternative employment exists, Employer has shown that a range of jobs exists that is reasonably available and that Claimant could realistically secure and perform those jobs. *Carlisle*, 227 F.3d at 941. In *Carlisle*, the Seventh Circuit adopted the Fifth Circuit's less restrictive standard of establishing suitable alternative employment as promulgated in *Turner*, 661 F.2d 1031. *Id.* This test is less stringent than that adopted by other circuits and does not "make the employer, in effect, an employment agency, required to secure specific positions for a claimant to satisfy the millstone of proof." *Turner*, 661 F.2d at 1042. Instead, the Employer must simply show that jobs exist that the Claimant is physically and mentally capable of performing or capable of being trained to perform, considering the Claimant's age, background, employment history and experience, and intellectual and physical capacities. *Id.*; *Carlisle*, 227 F.3d at 941. Simply matching general statements of the Claimant's job skills with general descriptions of jobs fitting those skills is not enough, however, to establish the existence of suitable employment alternatives. *Carlisle*, 227 F.3d at 942.

Employer must demonstrate that these jobs are reasonably available in the community in which Claimant is able to compete and could realistically be secured. *Turner*, 661 F.2d at 1042; *Carlisle*, 227 F.3d at 941. As the *Turner* court pointed out, this analysis requires a determination of whether there exists a reasonable likelihood that Claimant would be hired if he diligently sought the job. 661 F.2d 1042-43. Finally, Employer must establish Claimant's earning capacity by at least establishing the pay scale for alternate jobs. *See Moore v. Newport News Shipbuilding & Dry Dock Co.*, 7 BRBS 1024 (1978); *Dupuis v. Teledyne Sewart Seacraft*, 5 BRBS 628 (1977). In determining the availability of suitable alternative employment, the administrative law judge may rely on the testimony of vocational counselors. *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232, 236 (1985).

An assessment of Claimant's capabilities, considering his age, background, characteristics, and other relevant attributes establishes that Claimant is a young man, only 25 years old at the time of the hearing. He graduated high school with average grades, and there is no evidence in the record that he was mentally retarded prior to or after the accident. He lives in a rural area of Illinois, but Mr. Kaver's and Ms. Lantham's reports demonstrate that there are suitable jobs which he could perform available in surrounding areas.

Claimant contends that as a result of his injuries, his emotional and cognitive capabilities are diminished to a point where he cannot find and maintain employment in a competitive market. (CB 19, fn 4). However, the evidence of record does not support this contention. The medical evidence shows that Claimant does suffer some cognitive deficits, but is able to return to unskilled labor and to perform repetitive job tasks. Dr. Gray thought Claimant could benefit from a job coach, and Dr. Oliveri opined that he would need significant structure and supervision, but neither opinion supports the conclusion that Claimant *cannot* perform *any* job

tasks. Indeed, in 2002, both of Claimant's treating physicians, Dr. Weber and Dr. Goris, released Claimant to work with no restrictions. [6]

Mr. Dolan opined that the Claimant was unable to return to work in a competitive work environment because his extreme fatigue, among other things, prevented him from working full-time. Mr. Dolan's opinion on this point is inherently incredible based his conclusion on Claimant's self-reported history of sleeping more since the accident. He does not point to any medical evidence to support this conclusion. Claimant's descriptions of his limitations, particularly "difficulty carrying a glass of water or a plate of food," "difficulty maintaining balance while sitting," "slurred speech," "frequent confusion," and "memory problems," are inconsistent with Claimant's testimony at the hearing, and Employer's video of his bowling, socializing, and driving activities. As Mr. Dolan himself pointed out, Claimant's self-reported history during Mr. Dolan's interview was in substantial part not credible. Moreover, Claimant's description of his allegedly more severe incapacities is not consistently corroborated by the recorded observations of the several experts who evaluated him. Yet Mr. Dolan bases his opinion that Claimant cannot maintain a full-time job because of severe fatigue principally on Claimant's self-reported limitations alone. Therefore, Mr. Dolan's opinion in this regard is unpersuasive, because the evidence establishes that, to the extent that Claimant does suffer fatigue, it is simply because Claimant has chosen not to engage in any regular physical activity since the accident, and it is not attributable directly to his accidental injuries. As Dr. Weber pointed out, by not engaging in regular physical activity, one becomes "out of shape." Likewise, the evaluator at Coleman Tri-County Services observed that Claimant showed signs of fatigue while performing janitorial services attributable to Claimant's sedentary lifestyle. The evaluator did not conclude that Claimant could not return to work a full-time schedule because of the fatigue; rather, the evaluator suggested only that Claimant could not return to work as a janitor *at that time*, therefore implying that he could improve his conditioning.

Claimant seems to suggest that he cannot return to work because he is unable to control his anger. However, with the sole exception of Mr. Dolan, none of the experts who evaluated Claimant observed such a significant lack of behavior control. Claimant's grandparents both testified as to Claimant's lack of anger control at home, but there is no evidence of record which suggests that Claimant would exhibit such behavior in the work place, nor is there any evidence which suggests that his outbursts are so severe that they would prevent him from functioning in the work place. Mr. Dolan's description of the contrast between Claimant's rudeness and petulance with his grandmother and politeness to him during an interview belies any substantial lack of self-control. In addition, Mr. Dolan's testimony at the hearing regarding Claimant's use of a cane undermined the credibility of his report, as well as his description of Claimant's capabilities, which was so dependent upon disclosures of admittedly doubtful reliability by Claimant.

Finally, Claimant's contention that his short-term memory and balance problems prevent him from returning to work is unpersuasive. Claimant's own testimony revealed no short-term memory impairment when he recited the number of days he owned each of his cell phones. His

[6] Dr. Goris treated Claimant for his shoulder injury. Claimant argues that he cannot return to work not because of physical disabilities, but because of cognitive and emotional disabilities. Therefore, Dr. Goris's release is less probative than Dr. Weber's release.

alleged balance issues are not proved to be severe enough to prevent him from bowling, playing pool competitively, or riding his four-wheeler in a risky manner while standing. Therefore, any short-term memory or balance problems that he may have are not shown to be sufficient to prevent him from performing unskilled labor in the course of employment. The evidence, therefore, establishes that Claimant is able to return to some type of work.

Whether jobs are available that Claimant could obtain if he tried diligently is resolved by the credible vocational reports in the record which establish that such suitable alternative employment is available to Claimant. Mr. Kaver's report identifies six opportunities which are consistent with Claimant's skills. As to those six opportunities, his report satisfies the standard set forth in *Carlisle* and *Turner*. Ms. Lantham's report complies with that standard only as to her identification of the lot man opening at Jim Hayes Ford dealership. These seven opportunities require only a high school diploma and no specialized skills. They all offer on-the-job training, and in some instances, the employers have indicated that they are especially willing to accept applicants who need special assistance because of his disabilities. At least two of the opportunities provide extra structure in that employees are given a job list from which they are to work. None of the opportunities involve highly detailed or complex job tasks.

Claimant contends that when Mr. Dolan telephoned the employers that Mr. Kaver identified in his report, each of the employers informed Mr. Dolan that they would not be willing to hire an individual who needed extraordinary supervision and might need a job coach. Therefore, Claimant contends that Mr. Kaver's report is not credible. However, the evidence brings Mr. Dolan's report into question. Mr. Kaver provided detailed written reports of the calls he made to the various employers, including the dates he made the calls, the names of and positions of his contacts, and quite detailed descriptions of the positions being offered. On the other hand, Mr. Dolan had nothing in writing to evidence the calls he made. He provided no supplemental reports, and, in fact, did not have notes on the phone calls available at the hearing. Therefore, Mr. Kaver's report of his phone calls to potential employers is more credible than Mr. Dolan's uncorroborated report.

Claimant contends that Mr. Kaver mislead the potential employers as to Claimant's disabilities when he made the phone calls. This argument is also unpersuasive. Mr. Kaver informed the employers that Claimant had not fully recovered from a brain injury, and provided a specific explanation of Claimant's deficits and needs. On the other hand, Mr. Dolan described Claimant's needs generally as "extraordinary supervision" and apparently did not detail Claimant's specific deficits. Thus, Mr. Kaver's inquiries to the potential employers as described were more detailed and deemed to be more likely to elicit reliable responses.

Claimant also relies on Mr. Dolan's conclusion that Claimant's purported need for a job coach for an indeterminate time renders him unable to secure and maintain employment in a competitive environment. The consensus among the expert witnesses is that Claimant would need a job coach, at least initially, in order to obtain a job in a competitive employment environment. However, Mr. Dolan is the only expert who contends that Claimant will need a job coach indefinitely and for a period of years, because of Claimant's alleged short-term memory deficits. However, Claimant's allegations of poor short-term memory were contradicted by his own testimony, and the alleged deficits were not proved to be substantial or exceptional, so that

Mr. Dolan's conclusion that Claimant's short-term memory requires the services of a job coach for an extended period of time is unpersuasive. Mr. Dolan, the only expert to define the term "job coach" with any specificity, explained that a job coach is someone who teaches an employee how to do a job, but there is no persuasive evidence that on-the-job training provided by another employee of a potential employer could not satisfy this requirement. Thus, there is substantial evidence in the record that establishes that there is suitable alternative employment available to Claimant, and that Claimant could secure that employment if he tried diligently.

Since Employer has established that suitable alternative employment is available, Claimant must show that he has diligently tried to secure such employment but has failed to obtain such employment. *Turner*, 661 F.2d at 1043. Since Claimant candidly admitted at the hearing that he had not made any attempt to find a job since the accident, he has not made this required showing, and, therefore, has not proved that he is totally disabled under the Act.

2. Partial Disability

Although the evidence does not establish that Claimant is totally disabled, proof of partial disability is not foreclosed. Sections 8(c)(21) and (e) of the Act provide for an award for partial disability benefits based on the difference between a claimant's pre-injury average weekly wage and post-injury wage-earning capacity, each of which must be determined. 33 U.S.C. § 908(c)(21), (e); *Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39 (1996).

A. *Post-Injury Wage Earning Capacity*

Post-injury wage-earning capacity is determined under Section 8(h), which provides that a claimant's wage-earning capacity shall be his actual post-injury earnings if these earnings fairly and reasonably represent his wage-earning capacity. 33 U.S.C. § 8(h); *Mangaliman*, 30 BRBS 39. If there are no post-injury earnings, the administrative law judge must consider relevant factors, including but not limited to the nature of the injury and the claimant's usual employment, and calculate a dollar amount which reasonably represents the claimant's wage-earning capacity. 33 U.S.C. § 8(h); *Mangaliman*, 30 BRBS 39. The objective of the inquiry is to determine the post-injury wage to be paid under normal employment conditions to the claimant as injured. *Mangaliman*, 30 BRBS 39 (*citing Long v. Director, Office of Workers' Compensation Programs*, 767 F.2d 1578 (9th Cir. 1985); *Cook v. Seattle Stevedore Co.*, 21 BRBS 4, 6 (1988)). Where a claimant contends he is totally disabled, and the employer establishes that there is suitable alternate employment, the earnings established for the alternate employment are deemed to show the claimant's wage-earning capacity. *See Berkstresser*, 16 BRBS at 232-34.

Claimant has no actual post-injury wages. Employer has established that there is suitable alternate employment available to Claimant. Therefore, Claimant's post-injury wage-earning capacity is measured by the earnings established for the alternate employment. *See Berkstresster*, 16 BRBS at 232-34. The precise hourly wage is determined by calculating the mean of the hourly wages offered for those positions which constitute suitable alternate employment. *See Avondale Industries v. Pulliam*, 137 F.3d 326 (5th Cir. 1998). The average hourly wage for the

seven positions identified by Employer's experts is $7.04. Thus, Claimant's post-injury wage-earning capacity is $7.04 per hour, or $281.60 per week.[7]

B. *Pre-Injury Average Weekly Wages*

Pre-injury average weekly wages are determined under Section 10 of the Act. 33 U.S.C. § 910; *Johnson v. Newport News Shipbuilding and Dry Dock Co.*, 25 BRBS 340 (1992). If, at the time of the injury, the claimant had not worked in the same job for most of the preceding year, the administrative law judge may use one of two methods for determining the claimant's pre-injury average weekly wage. First, under Section 10(b) of the Act, the administrative law judge may consider the earnings of an employee of the same class as the claimant who worked substantially the whole of the year preceding the injury in the same or similar employment. 33 U.S.C. § 10(b).

If the method provided for by Section 10(b) does not produce a reasonable and fair approximation of the claimant's average weekly wage, the administrative law judge may take into account the claimant's previous earnings in the employment in which he was working at the time of the injury as well as the earnings of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality. 33 U.S.C. § 910(c). Alternatively, in determining the claimant's average weekly wage using the second method, the administrative law judge may base his or her determination on the claimant's other previous earnings. *Id*. Section 10(c) is used where the claimant's employment is periodic, discontinuous, or seasonal. *Strand v. Hansen Seaway Serv.*, 614 F.2d 572, 575 (7th Cir. 1980); *Riddle v. Smith & Kelly Co.*, 13 BRBS 416, 418 (1981). The party contending that a claimant's actual wages at the time of injury do not accurately reflect his or her average weekly wages bears the burden of producing supporting evidence. *Id.*

Claimant argues that Section 10(b) should be applied in determining his pre-injury average weekly wages, and contends that the proper measure is the wages of Jim Long, another full-time elevator operator who was employed at the time that Claimant sustained the injury. (CB 25). However, as Employer correctly points out, Mr. Long was not an employee in the same class as Claimant. (EB 42). He was a permanent, full-time employee who had worked for Employer since 1997, while Claimant was a temporary employee who had worked for Employer less than a month prior to the injury. Thus, Mr. Long and Claimant were employees of different classes for purposes of applying Section 10(b). *See Walker v. Washington Metropolitan Area Transit Auth.*, 793 F.2d 319, 322 (D.C. Cir. 1986). Likewise, the wages of the other two employees alongside whom Claimant worked do not serve as a proper measure of Claimant's average weekly wages. *See id.* Mr. Palmer was a permanent full-time employee, and thus not of the same class as Claimant. Like Claimant, Mr. Brown was hired as a temporary employee; however, he had only been working for Employer for a month and a half prior to the injury. Thus, his wages cannot serve as the measure for Claimant's average weekly wages under § 10(b).

[7] $7.04 x 40 = $281.60. In this case, this calculation has the same result as the more elaborate formula prescribed by the Act.

Even if the wages of one of the other three employees could be used as a measure of Claimant's average weekly wages, § 10(b) still would not apply. Since Claimant's work was periodic or seasonal, § 10(c) is properly applied in determining Claimant's average weekly wages. *See Strand*, 614 F.2d at 575; *Riddle* 13 BRBS at 418. Thus, either Claimant's wages at the time of the accident as well as the wages of other employees in the same or similar class may be considered, or Claimant's prior earnings make be taken into account. *See* §10(c). The weekly wages he earned as an employee for Employer are not such a fair and reasonable measure of his average weekly wages because, as the evidence of record establishes, Employer always hired new employees at a low pay rate, and that pay rate, governed by a union contract, would increase at intervals with the number of days the new employees worked for Employer up to a year. 33 U.S.C. § 10(c). *See also Tri-State Terminals v. Jesse*, 596 F.2d 752 (7th Cir. 1979) (holding that a claimant's post-injury average weekly wages as determined under Section 10 must demonstrate "the Potential [sic] of the injured employee to earn and is not restricted to a determination based on previous actual earnings."). Moreover, the earnings of Claimant's co-workers do not fairly and reasonably depict Claimant's average weekly wages because each employee would have been paid a different hourly wage depending on the number of days that the employee had worked for Employer. 33 U.S.C. § 10(c). The wages of Mr. Brown, who was employed for roughly the same number of days as was Claimant at the time of the injury, do not fairly and reasonably reflect Claimant's average weekly wages for the same reason that Claimant's wages at the time are not a reasonable measure.

Claimant's employment history establishes that since high school, his employment has been intermittent. The only steady job he held prior to being employed by Employer was a nine-month stint as a forklift operator. His weekly wages as a forklift operator is held to be a fair and reasonable measure of his average weekly wages. As a forklift operator, Claimant earned $8.50 per hour; thus, under Section 10(c), a reasonable and fair representation of Claimant's pre-injury average weekly wages is $340 per week.[8] Since Claimant's post-injury wage earning capacity as established by the suitable alternate employment is $281.60 per week, Claimant is held to be partially disabled. Therefore, under Section 8 of the Act, Employer must pay compensation to Claimant at the rate of $38.54 per week, which is two-thirds of the difference between Claimant's pre-injury average weekly wage and his post-injury wage earning capacity. 33 U.S.C. § 908(c), (e).

CONCLUSION

Employer has produced substantial evidence to establish that suitable alternate employment is available to Claimant; therefore, Claimant is not totally disabled. The average of the wages offered by the suitable alternate employment is less than Claimant's pre-injury average weekly wage. Thus, Claimant has suffered a loss of wage-earning capacity, and Employer must compensate Claimant for this loss in accordance with Section 8 of the Act.

[8] $8.50 x 40 = $340. Claimant testified that as a forklift operator, he worked overtime and was paid overtime wages. Generally, when overtime hours are a regular and normal part of a claimant's employment, they should be considered in determining claimant's average weekly wage. *Brown v. Newport News Shipbuilding and Dry Dock Co.*, 23 BRBS 110, 112 (1989). However, in the instant case, Claimant did not produce any evidence of the number of overtime hours he worked, or whether overtime hours were a regular and normal part of his employment as a forklift operator. Therefore, Claimant's average weekly wage has not been proved to include overtime wages. The direct calculation produces the same result as the more elaborate calculation under the Act.

ORDER

On the basis of the foregoing, Claimant is entitled to permanent partial disability benefits.

Employer shall:

A. Commencing as of June 10, 2003 and continuing, pay to the Claimant compensation for permanent partial disability in the amount of $38.54 per week.

B. Pay to the Claimant all medical benefits to which he is entitled under the Longshore and Harbor Workers' Compensation Act.

C. Pay to the Claimant's attorney appropriate fees and costs to be established by a supplemental order.

A

Edward Terhune Miller
Administrative Law Judge